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PP v. SUHAIMI ABDULLAH

HIGH COURT MALAYA, SHAH ALAM
AKHTAR TAHIR J
[CRIMINAL APPEAL NO: 42LB(A)-5-02-2014]
24 FEBRUARY 2015

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CRIMINAL LAW: Penal Code – Section 409 – Criminal breach of trust – Court interpreter accused with dishonestly pawning off items from court exhibits for personal gain – Whether accused entrusted with property – Whether entrustment must be differentiated from performance of duty – Whether vital ingredient to sustain charge missing – Whether there was criminal misappropriation under s. 403 instead of s. 409 Penal Code – Non-calling of material witness – Whether adverse inference rightly invoked – Whether judge correctly used *voir dire* to determine voluntariness of accused's confession – *Prima facie* case – Whether established

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EVIDENCE: Confession – Voluntariness – Confession held inadmissible at end of *voir dire* – Whether rejection based on voluntariness or admissibility – Whether judge to rule only on weight to be given to confession

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The accused was an interpreter at the Selayang Magistrates' and Sessions Court who was charged for dishonestly pawning off court exhibits, which were in the form of gold items, for personal gain. The accused, however, was acquitted and discharged by the Sessions Court Judge of the 43 charges of criminal breach of trust under s. 409 of the Penal Code. The prosecution appealed against the said decision. The issues that arose were, *inter alia* (i) whether the accused had been entrusted with the property; (ii) whether there was sufficient evidence as to when the misappropriation took place; (iii) whether adverse inference should be invoked for prosecution's failure to call a material witness; and (iv) whether a *prima facie* case was established against the accused.

Held (dismissing prosecution's appeal):

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(1) For an offence of criminal breach of trust, the root ingredient is 'entrustment'. The accused had been entrusted by SP12, the Magistrate hearing the inquiry where the gold items were produced. According to SP12, she had directed the accused to hand over all the gold items to the Registrar to be kept in the strong room after the proceedings ended. It is trite law that entrustment must be differentiated from the performance of a duty. The fact that SP12 had directed the accused to hand over the items to the Registrar showed that the accused was asked to perform his duty and at no time was he entrusted with the property. This being the case, the vital ingredient to sustain a charge of criminal breach of trust was missing. Under the circumstances, even if the accused had pawned the jewellery he would have committed criminal misappropriation an offence under s. 403 of the Penal Code but certainly not under s. 409 of the Penal Code. (paras 11 & 12)

- (2) The persons and the pawn shop where the accused was said to have pawned the jewellery could not identify the accused as the person they had dealt with. For the items which could be linked to the accused by way of the pawn shop receipts, it could not be proven this were the same items which were the missing items from the court. Further, the prosecution led no evidence to show whether at any point of time the items were ever kept in the strong room or otherwise. There was no evidence as to when the misappropriation if any, actually took place. (paras 13-15) A
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- (3) The Sessions Court Judge had rightly invoked an adverse inference for the non-calling of a material witness, a Registrar of the court in charge of the strong room. This witness would have certainly thrown some light as to whether the accused had complied with the directions of SP12 to hand over the exhibits to her. (para 17) C
- (4) The prosecution had relied on the confession made by the accused of misappropriating the exhibits to SP13 and SP14 who held the post of Magistrates in the Selayang Court. The learned judge rightly held a *voir dire* to determine the voluntariness of the confession. At the end of the *voir dire* the learned judge disallowed the admissibility of the confession. This court agreed that there were valid reasons for rejecting the confession. Taking into account all the infirmities in the case of the prosecution, the prosecution had failed to prove a *prima facie* case against the accused. (paras 18-21) D
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Legislation referred to:

Criminal Procedure Code, ss. 153(2), 422

Penal Code, ss. 403, 409 F

Other source(s) referred to:

Ratanlal & Dhirajlal's Law of Crimes, 25th edn, p 2046

For the prosecution - Iswa Tonie; DPP

For the accused - Salim Bashir; M/s Salim Bashir Ruswiza & Co G

Reported by Suhainah Wahiduddin

JUDGMENT

Akhtar Tahir J: H

[1] The accused in this case was acquitted and discharged by the learned Sessions Court Judge of 43 charges of criminal breach of trust under s. 409 of the Penal Code.

[2] From the perusal of all the charges it could be ascertained that 42 out of the 43 offences were committed in the year of 2010. I

A [3] The appeal before me can be determined even without looking at the evidence for the reason that the trial did not adhere to the provisions of the Criminal Procedure Code (CPC).

B [4] Although it is a general rule under the CPC that each offence carry a separate charge and should be tried separately, the marked exception is however the offence of criminal breach of trust which is governed under s. 153(2) of the CPC. This provision provides as follows:

C When an accused is charged with criminal breach of trust or dishonest misappropriation of money it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of an offence within the meaning of section 164;

D Provided that the time included between the first and last of such dates shall not exceed one year.

[5] To me a statutory provision of the law cannot be brazenly ignored and especially not if it is phrased in a mandatory term as the above provision. To me the non-compliance of a statutory provision in this case has resulted in a mis-trial.

E [6] I could have ordered a re-trial but in this case an order of re-trial would have caused a prejudice to the accused in the light of the findings of facts of the learned Sessions Court Judge in his grounds of judgment. The prosecution would be given another bite of the cherry to the detriment of the accused.

F [7] I had also in mind the provision of s. 422 of the CPC which saves a proceedings conducted irregularly and is worded as follows:

Irregularities not to vitiate proceedings

G 422. Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of -

H (a) any error, omission or irregularity in the complaint, saction, consent, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code;

(b) the want of any sanction; or

(c) the improper admission or rejection of any evidence,

I unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[8] I proceeded to consider this appeal on merit in the light of the findings of the learned Sessions Court Judge and the very first finding of the learned judge which caught my eye was his findings on the exhibits tendered in court.

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[9] In this first finding the learned Sessions Court Judge noted that a number of exhibits in the form of pawn shop receipts and a number of gold items tendered were not at all related to the charge against the accused. It is strange that the learned judge detected the relevancy only when writing his grounds. In my view any ruling on relevancy as enunciated under the provisions of the Evidence Act 1950 should be made during the proceedings itself. This is to ensure non relevant evidence is not produced in the proceeding, as its production could be of detriment to the accused.

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[10] Be that as it may, the essence of the charge against the accused rested on the fact that the accused being an interpreter at the Selayang Magistrates' and Sessions Court and in such a capacity being entrusted to safe keep court exhibits in the form of gold items had dishonestly pawned off the items for personal gain.

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[11] For an offence of criminal breach of trust the root ingredient is 'entrustment'. The accused was said to have been entrusted by SP12 the Magistrate hearing the inquiry where the gold items were produced. According to SP12 she had directed the accused to hand over all the gold items to the Registrar to be kept in the strong room after the proceedings ended.

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[12] It is trite law that entrustment must be differentiated from the performance of a duty. The fact that SP12 had directed the accused to hand over the items to the Registrar showed that the accused was asked to perform his duty and at no time was he entrusted with the property. This being the case the vital ingredient to sustain a charge of criminal breach of trust was missing. Under this circumstances even if the accused had pawned the jewellery he would have committed criminal misappropriation an offence under s. 403 of the Penal Code but certainly not under s. 409 of the Penal Code.

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In *Ratanlal & Dhirajlal's Law of Crimes* 25th edn, on p. 2046 it is stated as follows:

Where an accused conductor collected bus fares from passengers but failed to deposit the said amount he was not held to be entrusted with the amount by anyone on behalf of Sikkim Nationalised Transport. **Being entrusted with doing a job is not the same thing as being entrusted with any property even though some money or other property may come into his hand in the course of doing the job.** There was held to be no material on the basis of which the accused could be charged of breach of trust (emphasis added)

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- A [13] However even misappropriation could not be proven in this case as the persons and the pawn shop where the accused was said to have pawned the jewellery could not identify the accused as the person they had dealt with.
- B [14] For the items which could be linked to the accused by way of the pawn shop receipts it could not be proven this were the same items which were the missing items from the court as mentioned in the charge.
- C [15] Further from the evidence of SP12 the inquiry she conducted lasted for a period of one year the final proceeding ending on April 2010. The prosecution led no evidence to show whether at any point of time the items were ever kept in the strong room or otherwise. In short there was no evidence as when the misappropriation if any, actually took place. In the words of the learned Sessions Court Judge:
- Oleh itu persoalan yang tidak terjawab sehingga kini ialah sama ada barang kes itu hilang sejurus selepas diberikan kepada tertuduh selepas prosiding terakhir oleh SP12 sebelum disimpan di dalam bilik kebal ataupun barang kes itu hilang selepas tertuduh menyerah simpanannya melalui pendaftar di dalam bilik kebal sebelum hilang
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- E [16] A further fact to note was if the items were actually kept in the strong room as directed, the strong room was accessible to all and sundry as the strong room was not usually locked nor supervised. SP2 a staff of the court himself admitted he had freely entered the strong room to retrieve exhibits kept there.
- F [17] In this case the learned judge rightly invoked an adverse inference for the non calling of a material witness by the name of Puan Zaleha Musa the Registrar of the court at the material time in charge of the strong room. This witness would have certainly thrown some light as to whether the accused had complied with the directions of SP12 to hand over the exhibits to her.
- G [18] A final point of note was the reliance of the prosecution on the confession made by the accused of misappropriating the exhibits to SP13 and SP14 who held the post of Magistrates in the Selayang Court at that point of time. Being persons of authority the learned judge rightly held a *voir dire* to determine the voluntariness of the confession. At the end of the *voir dire* the learned judge disallowed the admissibility of the confession.
- H [19] Although I agreed that there were valid reasons for rejecting the confession by the learned judge, the rejection should have been based on the weight to be given to the confession rather than its admissibility. At the end of the *voir dire* the learned judge should have only ruled on the voluntariness of the confession. If the confession was made voluntarily then it should have been admitted and only than the learned judge should have ruled on the weight to be given to the confession.
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[20] The learned judge however had rightly pointed out that even if the confession had been admitted the vital ingredients of the charge against the accused were still not proven.

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[21] Taking into account all the infirmities in the case of the prosecution I could do no better than agree with the learned Sessions Court Judge that the prosecution had failed to prove a *prima facie* case against the accused.

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[22] In the upshot I dismissed the prosecution's appeal against the decision of the learned Sessions Court Judge of acquitting and discharging the accused on all the charges against him.

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